CLERK'S COPY.

192

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 93

GULF OIL CORPORATION, PETITIONER,

vs.

CORNELIUS GILBERT, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GILBERT STORAGE & TRANSFER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 23, 1946.

CERTIORARI GRANTED MAY 20, 1946.

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United States District Court

SOUTHERN DISTRICT OF NEW YORK.

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Plaintiff-Appellant,

against

GULF OIL CORPORATION,

Defendant-Appellee.

Statement Under Rule XIII.

This action was commenced in the District Court for the Southern District of New York by the service of a summons and complaint on the defendant on the 16th day of May, 1945. No answer was served by the defendant.

An order to show cause was signed by Mr. Justice Edward A. Conger on the 29th day of May, 1945, and was served on the plaintiff on the 31st day of May, 1945. This order to show cause provided for the hearing of a motion to dismiss the complaint on either or both of the following grounds:

1. That the venue is improper and

2. That jurisdiction should not be assumed by the court.

On the 7th day of August, 1945, the District Court, per Leibell, J., granted the motion to dismiss the complaint on the ground that the Court in the exercise of discretion refused jurisdiction of the action, and judgment was rendered accordingly and entered on the 8th day of August, 1945.

Appeal was taken by plaintiff on the 21st day of August, 1945.

There has been no change of parties or attorneys.

4

Summons.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action File No. 31-183.

[SAME TITLE.]

To the above named Defendant:

5

You are hereby summoned and required to serve upon Max J. Gwertzman, plaintiff's attorney, whose address is 116 John St., N. Y. C., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: May 15, 1945.

(Sgd.) GEORGE J. H. FOLLMER,
Clerk of Court.

(Seal)

6

By _____
Deputy Clerk.

(Seal of Court)

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiff, by his attorney, Max J. Gwertzman, complaining of the defendant, alleges:

FOR A FIRST CAUSE OF ACTION:

FIRST: Upon information and belief, that at all the times hereinafter mentioned, the defendant was a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania.

SECOND: Upon information and belief, that at all the times hereinafter mentioned, the defendant was duly engaged in doing business in the State of New York, and maintained offices at No. 17 Battery Place, in the Borough of Manhattan, City, County and State of New York.

THIRD: That at all the times hereinafter mentioned, the plaintiff was a resident of the City of Lynchburg, in the State of Virginia.

FOURTH: That the amount in controversy exceeds the sum of Three Thousand ($3,000.) Dollars, exclusive of interest and costs.

FIFTH: That at all the times hereinafter mentioned, the plaintiff was engaged in the business of operating public warehouses in the City of Lynchburg, Virginia, and that

at all the times hereinafter mentioned, the plaintiff owned, operated and controlled the building 56-60 Seventh Street, in the City of Lynchburg, Virginia, which was operated as a public warehouse for the storage of general goods.

SIXTH: Upon information and belief, that at all the times hereinafter mentioned, the defendant was engaged in the business of refining and distributing petroleum products including gasoline.

11 SEVENTH: That at all the times hereinafter mentioned, there was located in the plaintiff's premises a gasoline tank and pump.

EIGHTH: That from time to time, prior to the 8th day of March, 1944, the plaintiff purchased from the defendant various quantities of gasoline for use in the plaintiff's pumps.

NINTH: That on or about the 8th day of March, 1944, the defendant, its agents, servants and/or employees, arrived at the plaintiff's premises to make a delivery of gasoline.

12 TENTH: That the defendant, its servants, agents and/or employees, in making a delivery of gasoline to the plaintiff's building and premises, were under a duty to do so in a careful and prudent manner and in accordance with good custom and usage, and were obligated to employ several methods and appliances to make certain that the said gasoline would be safely contained within the pipe lines, fill lines and other appurtenances used in and about the delivery, and would not be caused to overflow and to ignite.

ELEVENTH: That on or about the 8th day of March, 1944, while the defendant, its servants, agents and/or employees, were in the act of delivering a quantity of gasoline to the tank and pump located in and about plaintiff's building, the said gasoline was caused to escape from the truck of the defendant or of its servants, agents and/or employees, and was caused to explode and to set fire to the plaintiff's building aforementioned, causing great damage thereto.

TWELFTH: That the aforesaid occurrence was in no wise due to any negligence on the part of the plaintiff, its agents, servants, and/or employees, but was caused wholly and solely by reason of the carelessness and negligence of the defendant, its agents, servants and/or employees, in permitting and allowing the tank truck from which the delivery was being made to remain unguarded and unattended while the said delivery was being made; in permitting, causing and allowing gasoline to escape from the said truck and from the pipes and hoses connected thereto; and to escape freely in and about the plaintiff's building; as a result of which it was caused to explode and to become ignited in some manner unknown to the plaintiff; in failing to obey the rules and regulations and ordinances of the City of Lynchburg, which incorporate the provisions of the National Board of Fire Underwriters rules and regulations.

THIRTEENTH: That by reason of the foregoing acts of negligence, plaintiff's building was totally damaged and destroyed, all to the plaintiff's damage in the sum of Forty-one Thousand, Eight Hundred and Eighty-nine and 10/100 ($41,889.10) Dollars.

16 *Complaint.*

AS AND FOR A SECOND CAUSE OF ACTION:

FOURTEENTH: Plaintiff repeats and reiterates each and every allegation set forth in paragraphs of this complaint numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth" and "Tenth", with the same force and effect as though fully set forth herein.

FIFTEENTH: That on or about the 8th day of March, 1944, while the defendant, its servants, agents and/or
17 employees, were in the act of delivering a quantity of gasoline to the tank and pump located in and about plaintiff's building, the said gasoline was caused to escape from the truck of the defendant or of its servants, agents and/or employees, and was caused to explode and to set fire to the plaintiff's building aforementioned, causing great damage to plaintiff's personal property contained therein.

SIXTEENTH: That the aforesaid occurrence was in no wise due to any negligence on the part of the plaintiff, its agents, servants, and/or employees, but was caused
18 wholly and solely by reason of the carelessness and negligence of the defendant, its agents, servants and/or employees, in permitting and allowing the tank truck from which the delivery was being made to remain unguarded and unattended while the said delivery was being made; in permitting, causing and allowing gasoline to escape from the said truck and from the pipes and hoses connected thereto; and to escape freely in and about the plaintiff's building; as a result of which it was caused to explode and to become ignited in some manner unknown to the plaintiff; in failing to obey the rules and

regulations and ordinances of the City of Lynchburg, which incorporate the provisions of the National Board of Fire Underwriters rules and regulations.

SEVENTEENTH: That by reason of the foregoing acts of negligence, plaintiff sustained damage to merchandise and fixtures belonging to the plaintiff in the sum of Three Thousand, Six Hundred and Two and 40/100 ($3,602.40) Dollars.

AS AND FOR A THIRD CAUSE OF ACTION: 20

EIGHTEENTH: Plaintiff repeats and reiterates each and every allegation set forth in paragraphs of this complaint numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth" and "Tenth", with the same force and effect as though fully set forth herein.

NINETEENTH: That prior to and on or about the 8th day of March, 1944, the plaintiff was engaged in the business of warehousing general household and other property for the benefit of various customers, which said property was located in the plaintiff's building 56-60 Seventh Street, in 21 the City of Lynchburg, Virginia.

TWENTIETH: That the said property was in the custody and control of the plaintiff under warehouse receipts issued by the plaintiff to the said various customers.

TWENTY-FIRST: That on or about the 8th day of March, 1944, while the defendant, its servants, agents and/or employees were in the act of delivering a quantity of gasoline to the tank and pump located in and about plain-

22 *Complaint.*

tiff's building, the said gasoline was caused to escape from the truck of the defendant or of its servants, agents and/or employees, and was caused to explode and ignite plaintiff's building, as a result of which the property of various customers was damaged and destroyed.

TWENTY-SECOND: That the aforesaid occurrence was in no wise due to any negligence on the part of the plaintiff, its agents, servants, and/or employees, but was caused wholly and solely by reason of the carelessness and negli-
23 gence of the defendant, its agents, servants and/or employees, in permitting and allowing the tank truck from which the delivery was being made to remain unguarded and unattended while the said delivery was being made; in permitting, causing and allowing gasoline to escape from the said truck and from the pipes and hoses connected thereto; and to escape freely in and about the plaintiff's building; as a result of which it was caused to explode and to become ignited in some manner unknown to the plaintiff; in failing to obey the rules and regulations and ordinances of the City of Lynchburg, which incorporate the provisions of the National Board
24 of Fire Underwriters rules and regulations.

TWENTY-THIRD: That by reason of the foregoing acts of negligence, the property of certain customers of the plaintiff, whose goods were in the plaintiff's custody and control under warehousing agreements, was damaged and destroyed, to the extent of Three Hundred Thousand ($300,000.) Dollars.

AS AND FOR A FOURTH CAUSE OF ACTION:

TWENTY-FOURTH: Plaintiff repeats and reiterates each and every allegation set forth in paragraphs of this complaint numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth", "Tenth", and "Eleventh", with the same force and effect as though fully set forth herein.

TWENTY-FIFTH: That the aforesaid occurrence was in no wise due to any negligence on the part of the plaintiff, its agents, servants, and or employees, but was caused wholly and solely by reason of the carelessness and negligence of the defendants, its agents, servants and/or employees, in permitting and allowing the tank truck from which the delivery was being made to remain unguarded and unattended while the said delivery was being made; in permitting, causing and allowing gasoline to escape from the said truck and from the pipes and hoses connected thereto; and to escape freely in and about the plaintiff's building; as a result of which it was caused to explode and to become ignited in some manner unknown to the plaintiff; in failing to obey the rules and regulations and ordinances of the City of Lynchburg, which incorporate the provisions of the National Board of Fire Underwriters rules and regulations.

TWENTY-SIXTH: Plaintiff repeats and reiterates each and every allegation set forth in paragraphs of this complaint numbered "Nineteenth" and "Twentieth", with the same force and effect as though fully set forth herein.

TWENTY-SEVENTH: That by reason of the foregoing acts of negligence, plaintiff lost the use of his warehouse afore-

28 *Complaint.*

mentioned and was compelled to expend various sums in attempting to salvage and reduce the loss of his customers and did lose a portion of his business and of the profits accruing thereon, to his damage in the sum of Twenty Thousand Thirty-eight and 27/100 ($20,038.27) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Three Hundred Sixty-five Thousand, Five Hundred Twenty-nine and 77/100 ($365,529.77) Dollars, together with costs and disbursements of this action, and interest from the 8th day of March, 1944.

29

(Sgd.) MAX J. GWERTZMAN,
MAX J. GWERTZMAN;
Attorney for Plaintiff,
Office and Post Office Address,
No. 116 John Street,
Borough of Manhattan,
City of New York.

30

Order to Show Cause. 31

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE]

Upon the complaint herein, the affidavit of J. E. Jennings, sworn to the 26th day of May, 1945, the affidavit of Charles P. Bartlett, sworn to the 28th day of May, 1945 32
and the affidavit of Matthew S. Gibson, sworn to the 28th day of May, 1945, all annexed hereto, and upon all of the papers and proceedings heretofore had herein, it is

ORDERED, that the plaintiff show cause, at a term of this Court to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 26th day of June, 1945 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein dismissing the complaint upon one or the other, or both of the following 33
grounds:

1. That the venue is improper, as the plaintiff is a non-resident of this district and state, the defendant is a corporation organized under the laws of the Commonwealth of Pennsylvania, the alleged cause of action sounds in tort and arose outside of this state and district, to wit, in the State of Virginia, and said alleged cause of action did not arise out of, or have any connection whatsoever with, any business transacted by the defendant in this state and district; and

34 *Order to Show Cause.*

2. That jurisdiction of this action should not be assumed by this court because:

a. The customers of the plaintiff whose property was alleged to have been damaged and destroyed number approximately 350; all of them reside in the City of Lynchburg, Virginia, or vicinity and not in the State of New York or within the jurisdiction of this court or within the reach of its processes; and many of them will be necessary and material witnesses for the defendant;

35 b. There are numerous lay witnesses, including firemen, police officers, and other municipal employees, as well as contractors and engineers, whose testimony will be material and necessary on behalf of the defendant, and all these persons reside in and about the City of Lynchburg, Virginia, and are beyond the reach of the processes of this court;

c. It will be necessary for the defendant in the defense of this action to call as witnesses certain agents, servants, officers, and employees of a Virginia corporation, to wit, the Jennings-Watts Oil Co., Inc. and all of
36 such agents, servants, officers and employees reside in the State of Virginia, outside the jurisdiction of this court and beyond the reach of its processes; and said corporation itself may well be a necessary or proper party defendant in this action, for the reason that defendant will show that the negligence alleged in the complaint, if any, was committed by an employee of said corporation and not by an employee of defendant;

d. Upon the trial it will be necessary to prove the ordinances of the City of Lynchburg, Virginia and numerous applicable statutes and court decisions of the State of Virginia; and

e. There are available to the plaintiff in the city of his residence, Lynchburg, Virginia, both state and federal courts with sufficient jurisdiction to entertain this action, to summon before it and hear personally all material witnesses, to view the premises, and to reach with process all necessary and proper parties plaintiff and defendant; and it is further

ORDERED, that the plaintiff shall serve any answering affidavits to be used on the hearing of this motion upon Matthew S. Gibson, Esq., 17 Battery Place, New York 4, New York, attorney for the defendant, who has appeared specially herein by said attorney solely for the purpose of this motion and not otherwise on or before the 11th day of June, 1945 and that the defendant shall have the right to serve replying or supplemental affidavits on or before the 21st day of June, 1945; and it is further

ORDERED, that the time of the defendant to appear generally and answer or to make any motion with respect to the complaint herein be and the same hereby is extended until twenty (20) days after the final determination of this motion and the entry and service of an order thereon, if it be in any respect adverse to said defendant; and it is further

ORDERED, that sufficient cause appearing, service of this order and the annexed affidavits upon the plaintiff or its attorney on or before 5:00 o'clock in the afternoon on June 1st, 1945 shall be due and sufficient service thereof.

Dated, New York, N. Y., May 29, 1945.

(Signed) EDWARD A. CONGER,
U. S. D. J.

Affidavit of Matthew S. Gibson, Read in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE]

State of New York, }
County of New York, } ss.:

MATTHEW S. GIBSON, being duly sworn, deposes and says:

1. I am an attorney at law with an office at No. 17 Battery Place, New York, New York. I have been retained by the defendant solely for the purpose of appearing specially herein and moving to dismiss the complaint. I have no authority to appear generally for the defendant.

2. Annexed hereto and made a part hereof are the summons and complaint in the above entitled action. This cause is not yet at issue, the said summons and complaint having been served upon the defendant on the 16th day of May, 1945. The time for the defendant to answer or otherwise move herein expires on June 5, 1945. The defendant's motion to dismiss is being brought on by order to show cause instead of by the ordinary notice of motion for the reason that the time of the defendant to answer or move will expire before the parties shall have had an opportunity fully to present to the court their claims in support of and in opposition to such motion.

Affidavit of M. S. Gibson, Read in Support of Motion. 43

3. As appears from the complaint, and particularly from Paragraphs "Twelfth", "Sixteenth", "Twenty-second" and "Twenty-fifth" thereof, there will be drawn into question in this case the scope, validity, and effect of the rules, regulations, and ordinances of the City of Lynchburg, Va., as well as the statutes and court decisions of the State of Virginia. This court cannot take judicial notice of such rules, regulations, statutes, or decisions, and each of them will have to be proved in this court by competent evidence. Moreover, this court is not as accustomed to trying cases governed by the laws of Virginia as are the Federal and State courts sitting in Virginia. 44

4. From the complaint it also appears that the plaintiff, Gilbert, had a number of customers whose property was stored with him. It is alleged that such property was destroyed as a result of the negligence of the defendant, and the plaintiff seeks in this action to recover the value of such property.

There are, upon information and belief, approximately 250 of these customers all of whom reside in or near the City of Lynchburg, Virginia. It will be necessary to call many of these customers as witnesses for the defendant for the following purposes, among others: 45

(a) of determining the fair market value of their said property, for the damage to, and loss of, which plaintiff is suing;

(b) of determining whether and to what extent they shall have already been compensated for damage to or loss of their said property as a result of the facts alleged in the complaint, and if so, by whom they were so compensated, by what means, in what manner, and why;

46 *Affidavit of M. S. Gibson, Read in Support of Motion.*

(c) of determining whether there were any express or implied agreements between these customers and the plaintiff in connection with their alleged storage of goods in the plaintiff's warehouse, and if so what such agreements were; and

(d) of determining what, if any, authority these customers may have given to the plaintiff to sue for damage to or loss of their said property in this action and the scope or limitations of any such authority;

47 5. There are numerous other witnesses, including firemen, police officers, and other municipal employees, as well as contractors and engineers, whose testimony will be necessary on behalf of the defendant if this action is tried. All of these persons reside in and about the City of Lynchburg, Virginia, and consequently are beyond the reach of the processes of this court. Defendant would have no way to compel them to attend a trial here.

It is expected that these persons would be called for the purpose of testifying to the following matters, among others:

48 (a) The location and description of the place of the accident, as well as how the accident occurred;

(b) The nature of the gasoline storage and dispensing equipment installed at the premises of the plaintiff in Lynchburg, Virginia, its ownership, its condition before and after the alleged fire, whether it was in conformity with the local laws and ordinances, etc., etc.;

(c) The condition of the delivery truck as observed by these witnesses both before and after the fire alleged in the complaint; and

(d) The investigations made by such municipal employees and other persons residing in Lynchburg, Virginia immediately following the fire in question and the facts disclosed thereby.

"6. One of the principal defenses to be interposed by defendant in this action will be that no agent, representative, or servant of defendant made the delivery of gasoline to plaintiff at the time of the alleged fire, but that, on the contrary such delivery was made by a corporation known as Jennings-Watts Oil Co., Inc., in a 50
truck owned by it and driven by one of its employees. Upon information and belief, said Jennings-Watts Oil Co., Inc. was incorporated under the laws of the State of Virginia and has its principal place of business in the City of Lynchburg, Virginia. Upon information and belief, it transacts no business in the State of New York, cannot be found within this state, and has not designated an agent in the State of New York upon whom service may be had.

Furthermore, there exists between Jennings-Watts Oil Co., Inc. and the defendant a contract which was in full force and effect on March 8, 1944, the date of the alleged 51
fire, and which contract contains an indemnity clause to the effect that this defendant will be indemnified by said Jennings-Watts Oil Co., Inc. against all losses and claims such as the ones alleged in the complaint. Defendant cannot implead Jennings-Watts Oil Co., Inc. in this action in the court where it is presently pending.

The officers, agents, and employees of Jennings-Watts Oil Co., Inc. will become material witnesses for the defendant in the proper defense of this action, and it will be impossible to compel their attendance upon a trial in the Southern District Court of New York because they are beyond the reach of the process of this court. Among other things the defendant would endeavor to prove

52 *Affidavit of M. S. Gibson, Read in Support of Motion.*

through the officers, agents and employees of said corporation:

(a) That such corporation is an independent contractor and is not a servant or employee of this defendant; and

(b) That the facts and detail concerning the alleged fire on March 8, 1944 with which they are familiar show that the defendant is not liable to the plaintiff in this action.

The defendant, Gulf Oil Corporation, as alleged in the complaint, is a corporation organized and existing
53 under and by virtue of the laws of the Commonwealth of Pennsylvania. Its principal place of business is in the City of Pittsburgh, Pennsylvania. The defendant does some business in this district but none of the business done in this district has any connection whatsoever with the matters alleged in the complaint.

7. Upon information and belief, one of the aforementioned customers of the plaintiff has already brought a civil action in the State of Virginia in its courts against the plaintiff, Cornelius Gilbert, and has recovered in such action damages for loss of such customer's property as
54 a result of the fire on March 8, 1944 herein mentioned.

Upon information and belief another of such customers has asserted a claim for damages for loss of his property against said Jennings-Watts Oil Co., Inc. and has indicated that he might also assert a similar claim against the defendant herein.

8. There are available to the plaintiff in the City of his residence, Lynchburg, Virginia, both state and federal courts with sufficient jurisdiction to entertain this action and with power to call before it all of the material witnesses, including those hereinabove mentioned, and such

courts could obtain jurisdiction of the persons of all necessary and proper parties to this action and of the subject thereof.

9. As stated above there will be drawn into question in this action the ordinances of the City of Lynchburg and the laws and court decisions of the State of Virginia. In order for the defendant properly to answer the complaint, in the event of the denial of this application, it will be necessary for the defendant to inquire into the validity and effect of such ordinances and laws and to analyze such decisions. It will also be necessary for the defendant to interrogate many witnesses in the State of Virginia, in order properly to prepare its answer. For these reasons the defendant is requesting the court to extend its time to appear generally and answer or to make any motion with respect to the complaint herein until twenty days after the final determination of this motion, if it be in any respect adverse to the defendant. 56

10. I have been given some information concerning the facts with regard to the alleged cause of action set forth in the plaintiff's complaint, and, upon the basis of such information I am of the opinion that the defendant has a good and sufficient defense. In the event that it shall be ultimately held that this court should entertain jurisdiction of the subject of this action and of the person of the defendant and that this district is the proper venue, the defendant intends in good faith to interpose an answer to the complaint herein, without thereby waiving the right to make any motions with reference to the pleadings or otherwise. This application for an extension of time and this motion to dismiss the complaint are not interposed for the purpose of delay. 57

58 *Affidavit of M. S. Gibson, Read in Support of Motion.*

The time of this defendant to plead has not been extended by stipulation or order.

No previous application for the relief requested herein has been made to this court or to any judge thereof.

11. The sources of my information and the grounds for my belief as to all matters hereinabove stated upon information and belief are conversations with various officers and employees of the defendant and of said Jennings-Watts Oil Co., Inc., correspondence and reports con-
59 cerning the facts alleged in the complaint as well as conversations with the attorney for the plaintiff and as to all such matters I believe them to be true.

WHEREFORE, the defendant, appearing specially herein, respectfully prays that the court make an order in the form hereto annexed, and that, upon consideration of defendant's motion the court dismiss the complaint herein with costs and grant such other and further relief as to the court may seem just and proper.

MATTHEW S. GIBSON.

60 (Sworn to May 28, 1945.)

Affidavit of J. F. Jennings, Read in Support of Motion. 61

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE.]

State of Virginia, }
City of Lynchburg, } ss.:

62

J. F. Jennings, being first duly sworn, deposes and says:

I am President of Jennings-Watts Oil Co., Inc., of Lynchburg, Virginia. The Jennings-Watts Oil Co., Inc., was incorporated under the laws of the State of Virginia and has its principal place of business in the City of Lynchburg, State of Virginia. My company is engaged principally in the sale and distribution of petroleum products in Lynchburg and vicinity. My company has a contract with Gulf Oil Corporation for the sale and distribution of its products in the aforementioned territory.

63

On March 8, 1944, in response to an order from Gilbert Storage & Transfer Company, my driver, Robert O. Basham, made delivery of some gasoline to the place of business of Cornelius Gilbert at No. 56-60 Seventh Street in the City of Lynchburg, State of Virginia. The truck in which such gasoline was delivered was owned by Jennings-Watts Oil Co., Inc., and not by Gulf Oil Corporation. The driver, Robert O. Basham, who drove the truck at the time in question was employed by Jennings-Watts Oil Co., Inc., and not by Gulf Oil Corporation.

The Jennings-Watts Oil Co., Inc., does not transact business in the State of New York. It has designated no

64 *Affidavit of J. F. Jennings, Read in Support of Motion.*

agent in the State of New York upon whom service of process may be had.

I made an investigation immediately following the fire in question on March 8, 1944, at Mr. Gilbert's place of business and it was the driver of Jennings-Watts Oil Co., Inc., who was present at the time the fire in question occurred.

Because of the distance from Lynchburg to the City of New York and the inconvenience and loss it would cause the Jennings-Watts Oil Co., Inc., its employees and
65 officers including myself, we do not desire and will not, unless legally compelled to do so, attend the trial of this action in the City of New York, New York.

Gulf Oil Corporation owns none of the capital stock in Jennings-Watts Oil Co., Inc., and has no control over the operation of its business.

I am informed that an action has been instituted in the United States District Court for the Southern District of New York by Cornelius Gilbert against Gulf Oil Corporation for damages resulting from the aforementioned fire, and that this affidavit is given in support of defendant's motion to dismiss such action.

66 (Sworn to by J. F. Jennings on May 26, 1945.)

67

Affidavit of Charles P. Bartlett, Read in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE.]

State of Pennsylvania,
County of Philadelphia, } ss.:

68

Charles P. Bartlett, being first duly sworn, deposes and says:

I am employed by Gulf Oil Corporation in Philadelphia, Pennsylvania, and have charge of insurance and other claims arising out of damages resulting from fires and my duties are to make investigations of such claims, fires and other causes resulting in damage.

On March 8, 1944, a fire occurred at the warehouse of the plaintiff in the City of Lynchburg, Virginia, and when it became evident that some claim might be filed against Gulf Oil Corporation I went to the City of Lynchburg and made an investigation of this fire. Delivery of the gasoline to the plaintiff at the time the fire occurred was made in a truck owned and operated by Jennings-Watts Oil Co., Inc., a Virginia corporation, transacting business in the City of Lynchburg, Virginia. The driver of the truck who made the delivery in question was an employee of Jennings-Watts Oil Co., Inc., and not an employee of Gulf Oil Corporation.

69

Gulf Oil Corporation, upon information and belief, owns no stock in Jennings-Watts Oil Co., Inc., nor has any control over the operation of its affairs and business.

Affidavit of Chas. P. Bartlett, Read in Support of Motion.

Upon information and belief, Jennings-Watts Oil Co., Inc., does not transact business in the State of New York nor in fact outside the State of Virginia. In fact, its business is principally confined to the City of Lynchburg, Virginia, and vicinity.

All of the officers, agents and employees of Jennings-Watts Oil Co., Inc., reside in the City of Lynchburg, Virginia.

Upon information and belief, there are approximately 350 parties who had goods stored in plaintiff's warehouse
71 at the time the fire in question occurred and most, if not all, such parties reside in the City of Lynchburg, Virginia, and vicinity.

Upon information and belief, independent appraisers were brought into Lynchburg by plaintiff or plaintiff's insurance companies for the purpose of appraising the value and damage of such goods stored by these numerous parties in plaintiff's warehouse.

It is approximately 415 miles from Lynchburg, Virginia, to New York City. Because of gasoline and tire rationing and the crowded condition of the trains, and the lack of hotel accommodations during the present emergency
72 it will be difficult, if not impossible, to obtain the attendance in this court of any number of the parties who reside in Lynchburg, Virginia, and who are familiar with the facts involved in this action. It will cause great inconvenience to many of these parties to be required to leave their places of business and homes for the purpose of coming to New York and testifying to the facts concerning this action peculiarly within their knowledge. Because of such difficulties many of these parties, if not all, will refuse and decline to voluntarily make the trip.

It is my understanding that a suit has been filed by Cornelius Gilbert against Gulf Oil Corporation in the

Affidavit of Max J. Gwertzman, Read in Opposition to Motion.

United States District Court for the Southern District of New York for damages resulting from the fire in question and that this affidavit will be used by defendant, Gulf Oil Corporation, in support of its motion to dismiss such complaint.

CHARLES P. BARTLETT.

(Sworn to May 28, 1945.)

Affidavit of Max J. Gwertzman, Read in Opposition to Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York, }
City of New York, } ss.:
County of New York, }

MAX J. GWERTZMAN, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff herein and this affidavit is made in opposition to the defendant's motion to have this action dismissed.

The plaintiff resides in Lynchburg, Virginia. The defendant, Gulf Oil Corporation is a Pennsylvania corporation and has its principal place of business at Pittsburgh, Pennsylvania. It maintains large quarters at 17 Battery

76 *Affidavit of Max J. Gwertzman, Read in Opposition to Motion.*

Place, New York City, and does business in New York City and in New York State.

The defendant, in accordance with copy of certificate which is annexed hereto and marked "Exhibit B," duly designated Secretary of State, N. Y., to accept service in behalf of the said corporation in New York State.

In the accompanying memorandum of law, your deponent will point out that the United States Supreme Court has held that such a designation constitutes a con-
77 sent on the part of the defendant to be sued in New York State and since the defendant is in New York County, such an action can properly therefor be brought in the Southern District of New York. So long as the plaintiff has properly served the defendant in New York City, this court has jurisdiction of the cause of action.

This is not a motion for a change of venue on the ground of convenience of witnesses or for any other reason, but a motion to dismiss the action on the ground that the court has no jurisdiction thereof.

However, from the foregoing statement, the court clearly has jurisdiction of the cause of action in that the plain-
78 tiff has a perfect right to bring the action in this forum on the ground that the defendant has expressly consented to have service made upon the corporation in New York County.

The objections raised by the defendant properly have no connection with the question of jurisdiction. However, your deponent desires to point out to the court that the objections are highly tenuous and without factual basis.

The action has been instituted against the defendant based on a contract existing between it and the plaintiff to furnish gasoline to the plaintiff for the use in his warehouse. The contract is evidenced by the "Exhibit A"

annexed to the affidavit of the plaintiff herein, which clearly shows on its face that the Gulf Oil Corporation is selling oil and is asking that payment be made directly to it. Any contract or arrangements it may have with its distributors are no concern to the plaintiff and he certainly has a right to sue the defendant on the agreement which he has with it, regardless of the arrangements which the defendant may have with its own agents.

Your deponent personally investigated this entire case and was present in Lynchburg, Virginia, on various occasions in company with various engineers and other experts. There are no outside witnesses to this entire occurrence. The only persons who have any knowledge of what took place are the plaintiff and his employees and one R. O. Basham who was the driver of the truck which allegedly caused the explosion. Mr. Basham gave the plaintiff a statement; he gave various other parties statements and freely agreed to testify in behalf of any party who called him.

The defendant cannot therefore claim that it will be unable to offer the proof of this witness since he has not indicated to anyone that he would not testify if called upon in New York City.

The plaintiff is prepared to bring to the trial all the employees who were present and who have any knowledge of the occurrence. In addition, the plaintiff is prepared to bring the fire officials who appeared after the occurrence and who made an investigation. They have likewise indicated that they would be delighted to come to New York to testify. Insofar as expert witnesses are concerned, none of them resides in Lynchburg, Va., or its vicinity. The engineers all come from New York and the appraiser on the damages resides in North Carolina.

82 *Affidavit of Max J. Gwertzman, Read in Opposition to Motion.*

In regard to the 350 customers, very many of them no longer are in Lynchburg, Va., but have scattered because of the war over various parts of the country and some are even overseas. Their testimony will have to be taken by deposition in many cases and in view of the large amount of damages and the extremely long account which is involved, this case properly requires the service of a special master who can, of course, take hearings anywhere in the country if necessary.

83 Furthermore, there is no showing anywhere by the defendant that it could be served in Lynchburg, Va. That as a matter of fact, the method of operation which the defendant has in Virginia is through its agencies. The defendant does not have any offices or branch offices in Virginia. It operates entirely through its various local agents. It would therefore be necessary for the plaintiff to sue in Pennsylvania. Certainly, it would be just as convenient for the plaintiff to sue in New York as it would be to sue in Pennsylvania, and the objections therefore of the defendant to a suit in New York do not appear to be very sincere.

84 In view of these facts, your deponent respectfully asks that the motion be denied and the defendant be ordered to serve its answer.

(Signed) MAX J. GWERTZMAN.

MAX J. GWERTZMAN.

(Sworn to July 2, 1945.)

Affidavit of Cornelius Gilbert, Read in Opposition to Motion. 85

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of Virginia, }
City of Lynchburg, } ss.:

CORNELIUS GILBERT, being duly sworn, deposes and says: 86

That he is the plaintiff in the above entitled action.

That this affidavit is made in opposition to the motion of the defendant Gulf Oil Corporation for dismissal of the action herein which has been brought in the United States District Court for the Southern District of New York.

That your deponent purchased gasoline for the use of his gasoline pump situated in and about the plaintiff's premises at 56-60 7th Street, Lynchburg, Virginia, directly from the Gulf Oil Corporation.

That annexed hereto and marked "Exhibit A" is a photostatic copy of invoice number 564 which shows that on March 8th, 1944, the date when the explosion and fire took place, your deponent had purchased from the Gulf Oil Corporation 251 gallons of gasoline. Your deponent was instructed and did pay for previous deliveries and for the one in question, the Gulf Oil Corporation. Your deponent had no knowledge of any arrangements existing between the defendant Gulf Oil Corporation and its distributors. 87

88 *Affidavit of Cornelius Gilbert, Read in Opposition to Motion.*

That at the time this explosion took place, the driver who made the delivery, Mr. R. O. Basham, was in the office of the warehouse waiting for a delivery receipt to be signed. He had left the truck unattended while the gasoline was being delivered.

That your deponent was with Mr. Judd, your deponent's office manager in the office of the warehouse, and various other employees were engaged in their work throughout the building. As far as your deponent has been able to
89 ascertain, no independent outside witness could be found who knew anything whatsoever regarding the delivery of the gasoline and the explosion and fire which took place.

That after the fire, various engineers were brought from New York for the purpose of examining the premises and investigating the origin of the fire and the explosion.

That your deponent engaged the services of an appraiser who does not reside in Lynchburg, Va., but resides in the State of North Carolina to examine the items of damage which took place to the goods of the various customers.

90 That a great many of the customers who had property in your deponent's warehouse and who sustained losses by reason of the explosion and fire, do not at the present time reside in Lynchburg, Va., and if their testimony is necessary, it will have to be taken in various localities where they are now residing.

That your deponent is prepared to bring all the employees who were present and have any knowledge of the origin of the fire and the explosion to appear as witnesses at the trial which has been brought in New York. That the engineers and other expert witnesses are residents of New York. That the appraiser who examined

Affidavit of Cornelius Gilbert, Read in Opposition to Motion. 91

the goods of the various customers is a resident of the State of North Carolina.

WHEREFORE, your deponent respectfully requests that the trial of the action herein be permitted to take place in the United States District Court for the Southern District of New York.

CORNELIUS GILBERT.

(Sworn to June 25, 1945.)

92

93

Exhibit "A", Attached to Affidavit of Cornelius Gilbert.

(Photo-Offset—Mounted on Opposite Page).

EXHIBIT "A"

INVOICE

GULF OIL PRODUCTS
(GULF OIL CORPORATION)
J. F. JENNINGS, DISTRIBUTOR
LYNCHBURG, VA.

No. 564

GASO., KEROS., AND HEATING OILS—NOT. LUB. OILS, GREASES AND SPECIALTIES—IN 10 DAYS ON VALUE OF PRODUCT, EXCLUSIVE OF TAXES.

DS-0-6

SOLD TO Gilbert Storage, Towns Co. DATE 3-8-44

DRIVER	TRUCK	CUST. ORDER NO.

STREET ADDRESS

TOWN AND STATE City

PACKAGES NO	PACKAGES KIND	DELIVERED TO	GALLONS OR POUNDS	PRICE	FED. TAX	STATE LOCAL TAX	RENTAL	NET PRICE	AMOUNT
		TEST GRID GULF GASOLINE							
		GULF NO-NOX GASOLINE	251	15 [illegible]	13	5		20 [illegible]	70 54
Bulk		Gulflube #30	10	43				4	30
		Federal Tax			4				60

The State Tax (or Taxes, license, [illegible] fees) hereon noted will be paid by GULF OIL CORPORATION on or before due date, as required by law.

RECEIVED PAYMENT
PER R O Brookman

The undersigned agrees to pay GULF OIL CORPORATION for the goods listed hereon at the above address from which delivery was made.

TOTAL 55 88

REC'D BY. FIRM NAME
PER

IC 7015-D

Under the rules of the Interstate Commerce Commission consignees must remove shipments of Gasoline and Naphtha from depot within 48 HOURS after notice of arrival at destination. When not removed as above, heavy STORAGE CHARGES are assessed.

Gasoline and Naphtha drums returned EMPTY must have the old RED LABELS REMOVED, and all drums must have their filling and vent holes properly closed with original iron plugs.

RETURN EMPTY DRUMS TO ORIGINAL POINT OF SHIPMENT. List Drum Numbers carefully on Bill of Lading and bill as "Empty Iron Drums Returned" and send copy to us.

DRUMS—Steel drums remain our property and are loaned to you for transportation purposes only. The drum deposits required at time of shipment are redeemable subject to our regulations. Help conserve drums in the interest of Defense—empty and return same promptly with gaskets and plugs in place, do not permit anything other than original contents to be placed in our drums.

CLAIMS—For damaged shipments not allowed unless accompanied by Original Expense Bill with notations of shortage and Railroad Agent's signature within 30 days

100 **Reply Affidavit of Matthew S. Gibson, Read in Support of Motion.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE.]

101 State of New York, }
County of New York, } ss.:

Matthew S. Gibson, being duly sworn, deposes and says:

1. The plaintiff's attorney in his affidavit states that this "is not a motion for a change of venue on the ground of inconvenience of witnesses or for any other reason, but a motion to dismiss the action on the ground that the court has no jurisdiction thereof." The moving papers of the defendant are self-explanatory. The motion to dismiss the complaint is based in the alternative, upon one
102 or the other or both of the grounds stated in the Order to Show Cause signed by Judge Conger on May 29, 1945, viz. (1) that the venue is improper, for the reasons stated in such order and the accompanying affidavits; and (2) that jurisdiction of this action should not be assumed by this court, for the reasons likewise stated in said order and in the affidavits annexed thereto. The motion of the defendant is not to dismiss the complaint on the merits, but is clearly a motion to dismiss the complaint *without prejudice* to the right of the plaintiff to commence an action against the defendant in a proper forum.

Reply Affidavit of Matthew S. Gibson, Read in Support of Motion. 103

So, contrary to the statements made by the plaintiff's attorney that the "objections raised by the defendant properly have no connection with the question of jurisdiction," the defendant is expressly asking the Court not to assume jurisdiction for the reasons stated in the Order to Show Cause, the affidavits annexed thereto, this affidavit, and the accompanying Memorandum of Law of the defendant.

2. The plaintiff's attorney then proceeds to assume, for purposes of argument, that the defendant is raising objections in connection with the question of jurisdiction, and he attempts to meet such objections by stating, among other things, that the "action has been instituted against the defendant based on a *contract* . . ." and that the plaintiff "has a right to sue the defendant on the *agreement* which he has with it . . . ". A mere perusal of the complaint in the light of the plaintiff's affidavits discloses that this is a tort action, purely and simply, in which the plaintiff claims that due to the negligence of one R. O. Basham the plaintiff's customers and the plaintiff have suffered certain monetary damages. 104 105

3. The defendant, in its Memorandum of Law, will show that the decision of the United States Supreme Court in the contract action mentioned in the affidavit of the plaintiff's attorney has no application to this motion and affords no ground for a denial thereof and that the defendant has not expressly or by implication waived its right to make this motion to dismiss upon the particular facts of this case or consented to the bringing of this particular kind of action in this court by a non-resident plaintiff.

106 *Reply Affidavit of Matthew S. Gibson, Read in Support of Motion.*

4. In further answering to the merits of this motion the plaintiff's attorney states that "there are no outside witnesses to this entire occurrence." That is an inaccurate statement. There are numerous material witnesses not mentioned in either the affidavit of the plaintiff or that of his attorney whom it will be necessary for the defendant to call in order properly to defend and who reside in and around the City of Lynchburg, Virginia, beyond the reach of the process of this Court and beyond
107 the power of the defendant to bring here.

The statement of the plaintiff's attorney that the driver of the truck in question, R. O. Basham, has freely agreed to testify in behalf of any party who called him and has not indicated to anyone that he would not testify if called upon in New York City is, we submit, pure hearsay. Upon information and belief, this man now has a business of his own which he operates himself, alone, and it is highly improbable that he would willingly leave his business and come to New York City to attend a trial in this action. He is not under the control of the defendant and he is merely one of many witnesses to
108 whom the same remarks would apply.

The plaintiff's attorney in his affidavit (p. 3) admits that there are the "350 customers" mentioned in the defendant's affidavits and he then suggests that their testimony might be taken by deposition and that this case requires the services of a special master. The defendant submits that it is not appropriate to have the issue of liability in a tort action determined by a special master or by means of depositions. Where, as here, there are three courts available to the plaintiff in the city of his residence, with jurisdiction of the subject of the action and of all parties and with power to call before it and see and hear and judge the credibility of the witnesses

whose testimony will determine not only the issue of liability but also the issue of damages, the plaintiff should seek his remedy in such courts

5. The plaintiff in his affidavit states that a great many of these 350 customers "who had property in your deponent's warehouse and who sustained losses by reason of the explosion and fire, do not at the present time reside in Lynchburg, Virginia." In the defendant's moving affidavits it was stated upon information and belief that "most, if not all, such parties reside in the City of Lynchburg, Virginia, and vicinity." The plaintiff obviously knows about how many of these 350 customers still reside in and near Lynchburg, Virginia, and his failure to designate the approximate number who still reside there is, we submit, tantamount to an admission of the truth of the defendant's statements in that regard. 110

6. The plaintiff in his affidavit states that he "is prepared to bring all the employees who were present and have any knowledge of the origin of the fire and the explosion to appear as witnesses at the trial which has been brought in New York." The defendant has numerous prospective witnesses with knowledge concerning the cause of said fire, who are not under the control of the plaintiff or the defendant, and the defendant has no assurance whatever that the plaintiff can or will bring all these witnesses to New York. The plaintiff further says that "the engineers and other expert witnesses are residents of New York." He is obviously referring to the engineers and expert witnesses whom he will call to this trial. The defendant has several engineers and expert witnesses who reside in and around Lynchburg, Virginia, as stated in its moving affidavits. All of the statements of defendant's moving affidavits in respect of the lack 111

of availability of witnesses for this trial and the injustice of forcing it to try this case here are hereby reiterated and reaffirmed.

7. The plaintiff's attorney states (p. 3) that "there is no showing anywhere by the defendant that it could be served in Lynchburg, Virginia." The question is not whether the defendant could be served in Lynchburg, Virginia, but whether the courts, State and Federal, in Lynchburg, Virginia (which obviously have jurisdiction
113 of the subject of an action such as this) can obtain jurisdiction of the person of the defendant. The defendant, by power of attorney dated June 3, 1938, has duly appointed the Secretary of the Commonwealth of Virginia to be its true and lawful agent and attorney-in-fact upon whom all legal process against the defendant may be served and has authorized such secretary to enter an appearance in its behalf in any case or proceeding and has stipulated and agreed that any lawful process against the defendant which is duly served on said agent and attorney-in-fact shall be of the same legal force and validity as if served on the defendant. A copy of such power
114 of attorney, certified by the Acting Secretary of the Commonwealth of Virginia on the 5th day of July, 1945, is annexed hereto and made a part hereof. Such certificate contains a further certification that said power of attorney was in full force as of the date of the certificate. It has not been revoked and is still in full force and effect.

8. Defendant's Memorandum of Law will show conclusively that the United States District Court for the Western District of Virginia, sitting at Lynchburg, Virginia, has jurisdiction to entertain this action, is a proper venue, and can obtain jurisdiction of the person of the defendant.

Reply Affidavit of Matthew S. Gibson, Read in Support of Motion. 115

Said Memorandum will also show conclusively that the plaintiff can prosecute this action in two state courts of concurrent jurisdiction sitting in the city of his residence, Lynchburg, Virginia.

9. From the above it is clear that the plaintiff's conclusions to the effect that he cannot bring suit against the defendant in Virginia and that if this motion is granted he will have to commence his suit in Pennsylvania are entirely erroneous.

10. It seems obvious that the sole reason for the bringing of this action in this Court was to serve the convenience of the plaintiff's attorney, who happens to be a member of the bar of this Court, or to try to obtain a larger verdict, or to force the defendant to settle rather than to incur the expense and risks of a trial here without numerous material witnesses, or it may be that a combination of all three reasons caused the suit to be started in this court: The convenience of the parties and of the courts and the interests of fairness and justice all require that this action be dismissed without prejudice to the right of the plaintiff to commence another action in an appropriate forum. There is every good reason why this action should be prosecuted in the City of Lynchburg, Virginia, and no good or sufficient reason why it should be on the docket of this Court. 116 117

WHEREFORE, the defendant, appearing specially herein, respectfully reiterates its prayer that the Court dismiss the complaint herein with costs and that it grant such other and further relief as to this Honorable Court may seem just and proper.

MATTHEW S. GIBSON.

(Sworn to July 19, 1945.)

118 **Exhibit, Attached to Reply Affidavit of Matthew S. Gibson.**

OFFICE OF
SECRETARY OF THE COMMONWEALTH
Richmond, Virginia

COMMONWEALTH OF VIRGINIA
State Corporation Commission
Richmond

June 8, 1938

Secretary of the Commonwealth,
Richmond, Virginia.

119 Dear Sir:

Herewith please find power of attorney executed by Gulf Oil Corporation, a corporation of the State of Pennsylvania, which is authorized to do business in this State, appointing the Secretary of the Commonwealth its statutory agent, pursuant to the provisions of Section 3847, Code of 1919.

Also fee of one dollar, for recording in your office, receipt for which please acknowledge to the corporation, O. G. Cramer, Asst. Sec., Gulf Bldg., Pittsburgh, Pennsylvania.

Very truly yours,

120

N. W. ATKINSON,
N. W. ATKINSON,
Clerk of the Commission.

NWB
Enc.

RECEIVED AND FILED
Jun 9 1938
Secretary of the Commonwealth
$1.00

Exhibit, Attached to Reply Affidavit of Matthew S. Gibson

POWER OF ATTORNEY

For Appointment of Agent by a Foreign Corporation, doing business in Virginia, under Section 3847, Code of 1919.

KNOW ALL MEN BY THESE PRESENTS:

That Gulf Oil Corporation a corporation organized and existing under the laws of Pennsylvania acting under and pursuant to the provisions of Section 3847 of the Code of Virginia of 1919, as amended, has established and by these presents does establish an office in the State of Virginia to be located at East Ninth Street Road and Riverside Street, Richmond Virginia, at which all claims against the company due to residents of the State of Virginia may be audited, settled and paid, and has designated and does hereby designate W. T. Hyde, of East Ninth Street Road and Riverside Street, Richmond, Virginia, as its agent for the reception, audit, settlement and payment of claims against the company due to said residents of the State.

And the said Gulf Oil Corporation has further made, constituted and appointed and by these presents does make, constitute and appoint the Secretary of the Commonwealth of Virginia, and his successor or successors in office, to be its true and lawful agent and attorney-in-fact upon whom all legal processes against said corporation may be served, and who is hefeby authorized to enter an appearance in its behalf in any case or proceedings; and the said corporation hereby stipulates and agrees that any lawful process against the said corporation which is duly served on said agent and attorney-in-fact should be of the same legal force and validity as if served on said corporation.

124 *Exhibit, Attached to Reply Affidavit of Matthew S. Gibson.*

IN WITNESS WHEREOF the said Gulf Oil Corporation has executed this power of attorney in duplicate by causing its name to be hereunto signed by W. V. Hartmann, its Vice-President, with its corporate seal affixed and attested by O. G. Cramer, its Assistant Secretary. All done this 3d day of June, 1938.

GULF OIL CORPORATION
By W. V. HARTMANN
Vice-President.

125 SEAL

ATTEST:
O. G. CRAMER
Assistant Secretary.

State of Pennsylvania, }
County of Allegheny, } ss.

I, C. L. NETTING, a Notary Public in and for the State and county aforesaid, hereby certify that W. V. Hartmann and O. G. Cramer, whose names, respectively, as Vice-
126 President and Assistant Secretary of the Gulf Oil Corporation are signed to the foregoing power of attorney, have acknowledged the same before me in the county aforesaid.

Given under my hand and official seal, this 3 day of June, 1938.

C. L. NETTING
Notary Public.

C. L. NETTING, Notary Public
My Commission Expires
June 3, 1941

SEAL.

Exhibit, Attached to Reply Affidavit of Matthew S. Gibson. 127

COMMONWEALTH OF VIRGINIA

OFFICE OF THE

SECRETARY OF THE COMMONWEALTH

I, THELMA Y. GORDON, Acting Secretary of the Commonwealth, do hereby certify, That the foregoing is a full, true and correct copy of Power of Attorney appointing the Secretary of the Commonwealth Statutory Agent for Gulf Oil Corporation, and letter of transmittal from the State Corporation Commission, recorded in my said office on 9th day of June, 1938. I FURTHER CERTIFY that this Power of Attorney is in full force as of this date. 128

Given under my hand and under the Lesser Seal of the Commonwealth at Richmond, this 5th day of July, in the year of our Lord one thou-
(SEAL) sand nine hundred and forty-five and in the 169th year of the Commonwealth.

THELMA Y. GORDON
Acting Secretary of the Commonwealth.

129

130 Opinion of Leibell, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil 31-183.

[SAME TITLE]

MAX J. GWERTZMAN, ESQ.,
Attorney for Plaintiff,
131 116 John Street,
New York, N. Y.

MATTHEW S. GIBSON, ESQ.,
Attorney for Defendant, Appearing Specially,
17 Battery Place,
New York 4, N. Y.
(Archie D. Gray, Esq., and
Fred J. Locker, Esq., of Counsel).

LEIBELL, D. J.:

Plaintiff sues the defendant in tort claiming that
132 through the defendant's negligence in delivering gasoline at defendant's warehouse, located at Lynchburg, Virginia, the warehouse took fire and was destroyed with most of its contents. The complaint alleges four claims or causes of action. Plaintiff seeks damages in the first cause of action in the sum of $41,899.10 for the destruction of plaintiff's warehouse; in the second, $3,602.40 for damages to plaintiff's merchandise and fixtures; in the third, $300,000 for damages to the property of plaintiff's customers whose goods were in plaintiff's custody and control; and in the fourth, $20,038.17 for loss of the

use of the warehouse, loss of profits and for expenditures in attempting to salvage customer's property.

Plaintiff is a resident of the City of Lynchburg, Virginia, where the warehouse was located and the goods were stored. The majority of his customers were residents of that section of Virginia. The defendant corporation is a resident of the State of Pennsylvania, but through a certificate filed with the New York Secretary of State was authorized to do business within the State of New York and is actually doing business here in the Borough of Manhattan. Defendant, in like manner, is 134
legally authorized to do business in the State of Virginia.

The gasoline which was being delivered at the plaintiff's warehouse at the time of the fire, had been ordered in the State of Virginia, and the delivery was being made by a distributor, Jennings-Watts Oil Co., Inc., also a resident of the State of Virginia, doing business in the City of Lynchburg. The fire took place March 8, 1944. The complaint was filed in this Federal Court on May 15, 1945.

The defendant has moved, through an order to show cause, for an order dismissing the complaint filed herein: 135

"upon one or the other or both of the following grounds:

1. That the venue is improper, as the plaintiff is a non-resident of this district and state, the defendant is a corporation organized under the laws of the Commonwealth of Pennsylvania, the alleged cause of action sounds in tort and arose outside of this state and district, to wit, in the State of Virginia, and said alleged cause of action did not arise out

136 *Opinion of Leibell, D. J.*

of, or have any connection whatsoever with, any business transacted by the defendant in this state and district; and

2. That jurisdiction of this action should not be assumed by this court because:

a. The customers of the plaintiff whose property was alleged to have been damaged and destroyed number approximately 350; all of them reside in the City of Lynchburg, Virginia, or vicinity and not in the
137 State of New York or within the jurisdiction of this court or within the reach of its processes; and many of them will be necessary and material witnesses for the defendant;

b. There are numerous lay witnesses, including firemen, police officers, and other municipal employees, as well as contractors and engineers, whose testimony will be material and necessary on behalf of the defendant, and all these persons reside in and about the City of Lynchburg, Virginia, and are beyond the reach of the processes of this court;

138 c. It will be necessary for the defendant in the defense of this action to call as witnesses certain agents, servants, officers, and employees of a Virginia corporation, to wit, the Jennings-Watts Oil Co., Inc., and all of such agents, servants, officers and employees reside in the State of Virginia, outside the jurisdiction of this court and beyond the reach of its processes; and said corporation itself may well be a necessary or proper party defendant in this action, for the reason that defendant will show that the negligence alleged in the complaint, if any, was committed by an employee of

said corporation and not by an employee of defendant;

d. Upon the trial it will be necessary to prove the ordinances of the City of Lynchburg, Virginia, and numerous applicable statutes and court decisions of the State of Virginia; and

e. There are available to the plaintiff in the city of his residence, Lynchburg, Virginia, both state and federal courts with sufficient jurisdiction to entertain this action, to summon before it and hear personally all material witnesses, to view the premises, and to reach with process all necessary and proper parties plaintiff and defendant; * * *".

I have concluded that the venue of the action is not improper for any technical reason, but that for good and sufficient reasons hereinafter stated this Court in the exercise of its discretion should decline to assume jurisdiction of this action.

The plaintiff, in opposing the defendant's motion, states that on March 8, 1944, the date when the explosion and fire took place, the plaintiff had purchased from the Gulf Oil Corporation 251 gallons of gasoline and the plaintiff annexes to an opposing affidavit a copy of the invoice. The invoice is important, but on this motion it aids the defendant rather than the plaintiff. It shows that the contract for the purchase of the gasoline was made and performed at Lynchburg in the State of Virginia.

Plaintiff states that the driver of the delivery wagon was in the office of the warehouse at the time of the explosion and was waiting for a delivery receipt for the gasoline to be signed by plaintiff; that plaintiff and

142 *Opinion of Leibell, D. J.*

his office manager, Mr. Judd, and various other employees of the plaintiff were in the warehouse; and that in plaintiff's opinion "no independent outside witness could be found who knew anything whatsoever regarding the delivery of the gasoline and the explosion and fire which took place." Plaintiff's affidavits also state that various engineers were brought from New York for the purpose of examining the premises and investigating the origin of the fire and the explosion; that plaintiff engaged the services of an appraiser, who does not reside in Lynch-
143 burg, Virginia, but resides in the State of North Carolina, to examine the damage to the goods of plaintiff's customers. Plaintiff also asserts that a great many of the customers who had property in his warehouse and who sustained losses by reason of the explosion and fire, do not at the present time reside in Lynchburg, and that if their testimony is necessary it will have to be taken in various localities where they are now residing. In conclusion the plaintiff states that he "is prepared to bring all the employees who were present and have any knowledge of the origin of the fire and the explosion to appear as witnesses at the trial which has
144 been brought in New York".

The attorney for the plaintiff has also filed an opposing affidavit herein, to which he has annexed a certificate from the Secretary of the State of New York showing that the defendant, when authorized to do business within the State of New York, designated the Secretary of State to accept service on behalf of the defendant corporation in New York State. Plaintiff's attorney argues from that that the defendant has thereby expressly consented to have service made upon the corporation in New York. He states—

145

"The plaintiff is prepared to bring to the trial all the employees who were present and who have any knowledge of the occurrence. In addition, the plaintiff is prepared to bring the fire officials who appeared after the occurrence and who made an investigation. They have likewise indicated that they would be delighted to come to New York to testify. Insofar as expert witnesses are concerned, none of them reside in Lynchburg, Va., or its vicinity. The engineers all come from New York and the appraiser on the damages resides in North Carolina. In regard to the 350 customers, very many of them no longer are in Lynchburg, Va., but have scattered because of the war over various parts of the country and some are even overseas. Their testimony will have to be taken by deposition in many cases and in view of the large amount of damages and the extremely long account which is involved, this case properly requires the service of a special master who can, of course, take hearings anywhere in the country if necessary."

146

He adds in a concluding paragraph that "there is no showing anywhere by the defendant that it could be served in Lynchburg, Va."

147

In reply affidavits the defendant shows that in June, 1938, it filed with the Secretary of the Commonwealth of Virginia a power of attorney designating the Secretary of Virginia the lawful agent and attorney-in-fact of the defendant upon whom all legal process against the defendant may be served and has authorized such Secretary to enter an appearance in its behalf in any case or proceeding and has stipulated and agreed that any lawful process against the defendant which is duly

148 *Opinion of Leibell, D. J.*

served on said agent and attorney-in-fact shall be of the same legal force and validity as if served on the defendant." Defendant's attorney shows that the plaintiff may prosecute this action in the State of Virginia, that the United States District Court for the Western District of Virginia, sitting at Lynchburg, Virginia, has jurisdiction to entertain this action and can obtain jurisdiction of the person of the defendant, and that it will not be necessary for the plaintiff to sue the defendant in the State of Pennsylvania. Concerning the plaintiff's
149 suggestion that the testimony of many of the customers could be taken on deposition herein before a Special Master, the defendant replies that it would be better if their testimony were made available by their presence in person in the state courts of the State of Virginia or in the Federal District Court there. The state courts hold sessions at Lynchburg, Virginia.

In his reply brief on this motion the plaintiff's attorney argues:

> "In effect, the arguments raised by the defendant attempt to limit the plaintiff to suit solely in Lynchburg. The court can readily realize that this action,
150 involving as it does, a claim for damages in an amount close to $400,000.00 is one which may stagger the imagination of a local jury, which is surely unaccustomed to dealing with amounts of such a nature, and furthermore, it may be difficult to obtain a jury which has not conceived preconceived notions concerning the facts in this case, which was widely publicized in the local newspapers. This may react in unfairness to either the plaintiff or the defendant."

These reasons are not too convincing and are far outweighed by the other considerations advanced by the defendant.

The defendant's attorney asserts that "there is every good reason why this action should be prosecuted in the City of Lynchburg, Virginia, and no good or sufficient reason why it should be on the docket of this Court." I agree with that conclusion and I believe that this Court, in the exercise of a sound discretion, should decline jurisdiction of this action. If this action had been brought in the New York Supreme Court that court, in 152
the exercise of a sound discretion, would have declined jurisdiction. That has been the rule in the courts of New York State as appears from the decisions of its highest court. See, *Gregonis* v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152, an opinion by Judge Crane, and *Jarman* v. *Wabash Railway Co.*, 246 N. Y. 244, an opinion by Judge Pound.

Under Section 225 of the General Corporation Law of the State of New York an action may be maintained against a foreign corporation by a non-resident "where a foreign corporation is doing business within this State." But the statutory provision does not require the State Court to accept jurisdiction in a tort action be- 153
tween non-residents where the tort occurred in some other state. Judge Crane discusses the origin and history of the New York statute above referred to and hesitates a number of cases which have reiterated the discretionary power of the State Court to decline to assume jurisdiction in a tort action between non-residents, where the cause of action arose outside the state. And this is so, even if the defendant is a foreign corporation legally authorized by the Secretary of State to do business within the State of New York.

154 *Opinion of Leibell, D. J.*

The plaintiff's attorney argues that in the matter of assuming jurisdiction the Federal Court does not follow the State Court in a case of this kind, since the jurisdiction of the Federal Court is expressed by the laws of Congress and by the federal decisions. That particular point has been ruled upon to the contrary by the Circuit Court of Appeals for this Second Circuit in a recent case entitled *Weiss* v. *Routh*, decided May 2, 1945, 149 F. 2d 193. In that case a dissenting stockholder of a Virginia corporation sued in this Court for
155 the fair cash value of his stock, and did not avail himself of the remedy afforded by §3822 of the General Corporation Law of Virginia. The District Court in this District had held that the dissenting shareholder was not limited to the remedies accorded him under the Virginia statute, and that this Court had the right to award him the fair cash value of his shares. The Circuit Court of Appeals, on its own motion, raised the question of whether the United States District Court of the Southern District of New York should have accepted jurisdiction of the case. Assuming the fact that the plaintiff had a remedy in equity on which he could file suit in this
156 District Court, the Circuit Court of Appeals went on to say—

> "It follows that both the New York Supreme Court in which the action was originally brought, and the District Court to which it was removed had jurisdiction over the action at bar. It does not, however, also follow that they should have asserted that jurisdiction. That question was not raised before Judge Goddard or before us; we have taken the objection of our own motion, for upon it depends the propriety of entertaining the action at all. When a trial involves 'the internal affairs' of a corpora-

tion, the rule is that the court of a foreign forum will not assume jurisdiction over it; and the first question is whether the doctrine of *Erie RR. Co.* v. *Tompkins*, (304 U. S. 64), applies; *i. e.* whether in deciding to accept or refuse jurisdiction we should follow the state law. It might be argued that those considerations which will set a court in motion are peculiar and personal to itself, and that it does not follow that what is enough to move a state court to act should be enough to move a federal; or vice versa. Such a doctrine would, however, imply that 158
the decision to accept jurisdiction is not controlled by any principle and may be at the judge's whim; and that would certainly be much too strong a statement. Here, as elsewhere, although judicial discretion does indeed imply that the limits are not rigidly fixed, it does not mean that there are none; and in dealing with the question at bar, we are to remember the purpose of conformity in 'diversity cases.' It is that the accident of citizenship shall not change the outcome; a purpose which extends as much to determining whether the court shall act at all, as to how it shall decide, if it does. For this 159
reason it seems to us that we should follow the New York decisions."

Applying that ruling to the facts in the case at bar, I am of the opinion that this Court should follow the law of the State of New York in this case where Federal jurisdiction is based upon the diversity of citizenship; and that I should exercise a sound discretion in deciding whether or not this Court should assume jurisdiction over this action. For reasons hereinabove stated

160 *Order Appealed From.*

I am of the opinion that an order should be entered herein declaring that this Court refuses jurisdiction of this action, and directing that the complaint be dismissed for that reason.

Dated, July 30th, 1945.

VINCENT L. LEIBELL,
United States District Judge.

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161 **Order Appealed From.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 31-183.

[SAME TITLE]

A motion having duly come on to be heard before Hon.
162 Vincent L. Leibell, District Judge, on July 24, 1945 by an order to show cause for an order dismissing the complaint on the grounds that the venue is improper and that jurisdiction should not be assumed for the reasons stated in the order to show cause,

Now on reading the complaint and reading and filing the order to show cause dated May 29, 1945, with proof of due service on the attorney for the plaintiff, the affidavits of Matthew S. Gibson, sworn to on May 28, 1945 and July 19, 1945, the affidavit of J. F. Jennings, sworn to on May 26, 1945 and the affidavit of Charles P. Bart-

lett, sworn to on May 28, 1945 in support of said motion, and the affidavit of Cornelius Gilbeft, sworn to on June 25, 1945, and the affidavit of Max J. Gwertzman, sworn to on July 2, 1945, in opposition thereto, and after hearing Matthew S. Gibson, appearing specially for the defendant in support of said motion, and Max J. Gwertzman, attorney for the plaintiff in opposition thereto, and after due deliberation having been had and the Court having made and filed its opinion July 31, 1945;

Now on motion of Matthew S. Gibson, attorney appearing specially for the defendant, it is 164

Ordered that the said motion be and the same hereby is granted on the ground that this court refuses to assume jurisdiction over this action, and it is

Further Ordered that the complaint herein be and the same hereby is accordingly dismissed.

Dated, New York, N. Y., August 7th, 1945.

Approved.

VINCENT L. LEIBELL. 165
United States District Judge.

Judgment rendered.

GEORGE J. H. FALLMER,
Clerk.

Aug. 8, 1945.

(Seal)

166

Notice of Appeal.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

Civ. 31-183.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that the plaintiff hereby appeals
167 to the Circuit Court of Appeals, held in and for the Second Circuit, from each and every part of a judgment and order made by Mr. Justice Vincent L. Leibell and entered in the office of the Clerk on the 8th day of August, 1945, dismissing this action on the ground that the Court refuses to assume jurisdiction over the action.

Dated, New York, August 21, 1945.

Yours, etc.,

MAX J. GWERTZMAN,
168 Attorney for Plaintiff,
Office & P. O. Address,
116 John Street,
Borough of Manhattan,
City of New York.

To:

GEORGE J. H. FOLLMER,
Clerk of the above Court.

MATTHEW S. GIBSON, ESQ.,
Attorney for Defendant,
17 Battery Place,
New York, N. Y.

169

Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Plaintiff-Appellant,

vs.

170

GULF OIL CORPORATION,

Defendant-Appellee.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, November 28th, 1945.

171

MAX J. GWERTZMAN,
Attorney for Plaintiff-Appellant.

MATTHEW S. GIBSON,
Attorney for Defendant-Appellee.

Approving agreed

172

Clerk's Certificate.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Plaintiff-Appellant,

vs.

173 GULF OIL CORPORATION,

Defendant-Appellee.

I, ~~GEORGE J. H. FOLLMER~~ William V Connell, Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

174 In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 30th day of November, in the year of our Lord one thousand nine hundred and forty-five and of the Independence of the said United States the one hundred and ~~sixty-ninth~~

William V Connell
~~GEORGE J. H. FOLLMER.~~
Clerk

(Seal)

[fol. 59] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 167

(Argued January 8, 1946. Decided February 4, 1946)

Docket No. 20049

CORNELIUS GILBERT, Plaintiff-Appellant,

v.

GULF OIL CORPORATION, Defendant-Appellee

Before: Augustus N. Hand, Clark and Frank, Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York

Action by Cornelius Gilbert, doing business as Gilbert Storage & Transfer Company, against Gulf Oil Corporation for damages for the negligent destruction of real and personal property located in Lynchburg, Virginia. From an order granting the defendant's motion that the court refuse jurisdiction of the action, 62 F. Supp. 291, the plaintiff appeals. Reversed and remanded.

[fol. 60] Max J. Gwertzman, of New York City, for plaintiff-appellant.

Matthew S. Gibson, of New York City (Archie D. Gray, of Houston, Tex., and Fred J. Locker, of New York City, on the brief), for defendant-appellee.

CLARK, Circuit Judge:

In this action plaintiff, resident in Virginia, sued defendant, a Pennsylvania corporation doing business in New York, for damages for the destruction of his Lynchburg warehouse and contents through an explosion of gasoline and resulting fire claimed to have been occasioned through defendant's negligence. Defendant by motion raised issues as to the venue of the action and the convenience of the forum, asserting that the witnesses were located at or near the scene of the destructive fire. The District Court found the venue proper, but accepted the view that the court

should refuse jurisdiction, citing and relying on New York state precedents. 62 F. Supp. 291. This appeal is prosecuted from the resulting dismissal of the action.

The District Court is clearly correct in holding venue proper. Since it appears that defendant had filed certificates for the doing of business with both the states of New York and Virginia, the combined operation of 28 U. S. C. A. § 112 and *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 128 A. L. R. 1437, makes it clear that suit was proper in federal courts in either Virginia or Pennsylvania or New York. And while plaintiff questions whether defendant is carrying on business in the Western District of Virginia, wherein Lynchburg is located, it is clear that service runs throughout the state, and thus to the Secretary [fol. 61] of the Commonwealth, defendant's statutory agent for service, in the Eastern District at Richmond. F. R. 4(f), upheld in *Mississippi Pub. Corp.* v. *Murphree*, 66 S. Ct. 242.

The question therefore turns upon the applicability of the doctrine of *forum non conveniens* under the circumstances here disclosed. That doctrine has a recognized ambit in both federal and local law to prevent the exercise abroad of supervision over the "internal affairs" of a corporation. *Rogers* v. *Guaranty Trust Co. of New York*, 288 U. S. 123, 89 A. L. R. 720; *Cohen* v. *American Window Glass Co.*, 2 Cir., 126 F. 2d 111; *Weiss* v. *Routh*, 2 Cir. 149 F. 2d 193; discussing New York cases; *Langfelder* v. *Universal Laboratories*, 293 N. Y. 200, 56 N. E. 2d 550. But even there the tendency is to limit it, and it has been confined to cases of relief which calls for "such detailed and continuing supervision that the matter could be more efficiently handled nearer home." *Williams* v. *Green Bay & Western R. Co.*, — S. Ct. —, Jan. 7, 1946, and see Frank, *J.*, dissenting below, 2 Cir., 147 F. 2d 777, 779. Here, however, we have the question of the application of the doctrine to an ordinery tort claim. The discussion in the *Williams* case appears to be directed to the single instance of supervision of a corporation; as we read the opinion, we see nothing in it authorizing the broad expansion of the doctrine throughout the field of torts. Certainly the whole tenor of the opinion is restrictive of the doctrine's application. Thus there is stressed its applicability *only* where maintenance of suit away from the defendant's domicile is "vexatious or oppressive," and it is said: "But where in this type of litigation only a money judgment is

sought, the case normally is different. The fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to decide it." Concluding that each case "turns on [fol. 62] its facts," the Court *reverses* the exercise by the lower courts of discretion in refusing jurisdiction. D. C. S. D. N. Y., 59 F. Supp. 98, and 2 Cir., 147 F. 2d 777.

It is true, as the District Court held, that the refusal of jurisdiction over tort claims between nonresidents has been extensively developed in the New York courts, much more so than in the federal system, so that jurisdiction may be refused to claimants under the Federal Employers' Liability Act equally with other foreign claimants, *Murnan* v. *Wabash R. Co.*, 246 N. Y. 244, 158 N. E. 508, 54 A. L. R. 1522; *Douglass* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, even though the litigant's choice in the federal courts is held absolute under the statute. *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, 136 A. L. R. 1222. Though the rule is stated broadly as though applicable to all tort claims, it seems in practice restricted to claims for personal injury and wrongful death; at least we have been cited to, and have found, no other cases. It clearly does not apply to contract claims,[1] and is said not to apply to cases of a commercial or property nature,[2] so that commentators have expressed doubt of its wider applicability.[3] More-

[1] *Wedemann* v. *U. S. Trust Co. of New York*, 258 N. Y. 315, 179 N. E. 712, 79 A. L. R 1320; *Hutchinson* v. *Ward*, 192 N. Y. 375, 85 N. E. 390, 127 Am. St. Rep. 909, even though the statutory provision authorizing suits by nonresidents makes no distinction in the subdivision dealing with foreign corporations doing business within the state. N. Y. General Corporation Law, § 225, subd. 4, which may be contrasted with subd. 1.

[2] *De Flammercourt* v. *Ascot*, 167 Misc. 473, 3 N. Y. S. 2d 461, 463, citing, *inter alia*, 1 Carmody's New York Practice 144, *Smith* v. *Crocker*, 14 App. Div. 245, 43 N. Y. S. 427, 4 Ann. Cas. 77, affirmed 162 N. Y. 600, 57 N. E. 1124, and *Wertheim* v. *Clergue*, 53 App. Div. 122, 65 N. Y. S. 750; *Rederiet Ocean Aktieselskab* v. *W. A. Kirk & Co.*, Sup., 51 N. Y. S. 2d 565.

[3] Compare 32 A. L. R. 6, 36, citing the earlier New York cases as in note 2 *supra;* 87 A. L. R. 1425, 1427-1429.

[fol. 63] over, the *acceptance* of jurisdiction even in personal injury cases seems not unusual by the trial courts, and quite acceptable to the appellate courts.[4] Thus, there is a very substantial doubt whether jurisdiction of this case would be refused by the New York courts.

We are clear, however, that New York law should not control in this situation. It is true that in *Weiss* v. *Routh*, *supra*, the court looked to New York law for light as to the extent to which courts would interfere with the internal management of a corporation. But that appears to us much nearer substantive law—that of corporate supervision—than is this question of the place of enforcement of a claim for money damages, and hence much closer to that mystic line past which we dare not venture without state tutelage. "Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used." *Guaranty Trust Co. of New York* v. *York*, 65 S. Ct. 1464, 1469. Further, we have the direct warning of the *Williams* case, where the Court considered the issue of the controlling effect of state law as held in the *Weiss* case and expressly reserved decision on that question.

We have, therefore, a problem which under federal precedents still seems debatable. The *Kepner* case, *supra*, warned against refusal of jurisdiction in a particular case controlled by congressional act; here the only difference is that congressional act, plus judicial interpretation (under the *Neirbo* case), spells out the result. Moreover, the [fol. 64] Court has lately stressed that district courts cannot refuse jurisdiction merely because of difficulties of decision. *Meredith* v. *Winter Haven*, 320 U. S. 228, 234; *Markham* v. *Allen*, — S. Ct. —, Jan. 7, 1946. But even if we assume arguendo that a case of this general sort may be sent elsewhere, we think there has been no showing of vexation

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[4] Thus jurisdiction has been accepted where the remedy elsewhere may be barred by limitation, *Williamson* v. *Palmer*, 181 Misc. 610, 43 N. Y. S. 2d 532; *Randle* v. *Inecto, Inc.*, 131 Misc. 261, 226 N. Y. S. 686, or is unduly expensive or inconvenient for the plaintiff, *Richter* v. *Chicago, R. I. & P. R. Co.*, 123 Misc. 234, 205 N. Y. S. 128; *Murnan* v. *Wabash R. Co.*, 246 N. Y. 244, 249, 158 N. E. 508, 54 A. L. R. 1522.

and oppression to the defendant sufficient to justify closing the doors of the courts here. The affidavits of the parties before the court are quoted at length in the opinion below, 62 F. Supp. 291, 292, 293. They show the plaintiff's claim that the only eyewitness of the explosion was the driver of the delivery wagon, delivering the gasoline to plaintiff's pump at the time, that he will come to New York, and that plaintiff is prepared to bring to the trial "all the employees who were present and who have any knowledge of the occurrence," as well as the fire officials who later investigated the fire. Plaintiff also asserts that certain witnesses, engineers investigating the fire, are located in New York. Defendant in reply affidavits questions the willingness of witnesses to go to New York, and further states only generally, and without specification of persons, that "there are numerous material witnesses" in and around Lynchburg it intends to call. In the face of plaintiff's assurances, this reference to numerous, but unidentified witnesses is too vague to justify dismissal.

Defendant also relies on the fact that plaintiff is seeking recovery for the losses to his 350 warehouse customers for whom he is bailee. To this plaintiff responds that many are already scattered from Lynchburg, and that their testimony by deposition will be necessary. He adds that some other form of trial, such as by reference to a master, would seem necessary of this issue, once the question of liability is settled. But whatever may be the practicability of plaintiff's suggestion in this regard, it would seem clear that the [fol. 65] burden rests upon him to prove his damage, that the difficulties of proof will be his, and that there will be little vexation or oppression to the defendant in combating that proof.

If we look to considerations of policy of somewhat broader scope, we come to the same conclusion. In view of the admonition of the *Meredith* and *Williams* cases, we cannot rely on the reasonable excuse of a state court that its calendars are too crowded to afford accommodations for pure visitors; and, indeed, if the business must be done in the federal courts anyhow, there is no saving in judicial man power in sending a case to a federal court in Pittsburgh or Lynchburg. Nor, in view of the venue statute, as now interpreted, can we make the interpretation made by the New York courts of their statutes to accommodate a *resident* plaintiff. *Gregonis* v. *Philadelphia &*

Reading Coal & Iron Co., 235 N. Y. 152, 139 N. E. 223, 32 A. L. R. 1. If refusal is to be made, we should have to justify it solely on convenience of trial, which seems to mean the place of residence of the greater number of witnesses.[5] To find the historic diversity jurisdiction limited and restricted in practice to trial at the situs of the wrong is a novel, perhaps a startling, change. It is one thing to say that innovations and improvements in this brand of federal activity should be made legislatively; thus the pending draft of the revised Judicial Code contains explicit pro-
[fol. 66] visions making corporations residents for venue purposes of districts where they are incorporated or licensed to do business, or *are doing business*, and authorizing a district court, "for the convenience of parties and witnesses," to "transfer any civil action to any other district where it might have been brought." Preliminary Draft, Revision of Federal Judicial Code, 1945, §§1391(a), 1404(a). But it is quite another for a court to introduce such a step as a practical limitation on jurisdiction.

This is a matter of federal policy, where the practice has been for the appellate courts to review the "discretion" exercised by the trial court. *Williams* v. *Green Bay & Western R. Co.*, *supra*; *Weiss* v. *Routh*, *supra*; *cf. Laugnes* v. *Green*, 282 U. S. 531, 541, 542. The admiralty rule authorizing the court to decline adjudication of claims between actual "foreigners," *i.e.*, aliens, is "inapposite" here —to use Justice Brandeis' apt expression in holding conversely that the equity and law cases did not govern in admiralty. *Canada Malting Co.* v. *Paterson Steamships*, 285 U. S. 413, 423; *Charter Shipping Co.* v. *Bowring, Jones & Tidy*, 281 U. S. 515; Coffey, *Jurisdiction Over Foreigners in Admiralty Courts*, 13 Calif. L. Rev. 93;

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[5] Mr. Justice Jackson concurring in *Miles* v. *Illinois Cent. R. Co.*, 315 U. S. 698, 705, 706, 146 A. L. R. 1104, suggests that "the real issue is whether a plaintiff with a cause of action under the Federal Employers' Liability Act may go shopping for a judge or a jury believed to be more favorable than he would find in his home forum." Whether or not this shrewd deduction becomes the basis of a definite rule of law, it obviously has less application in a case of this sort, where the ultimate recovery is limited by the value of tangible property, than in the actions for damages for personal injuries.

Robinson on Admiralty, 1939, 14-20. Since there is not sufficient basis here for the denial of jurisdiction, the order must be reversed and the case remanded.

FRANK, *Circuit Judge* (concurring):

It seems to me not entirely clear that the Supreme Court intended its discussion of the doctrine of *forum non conveniens* in *Williams* v. *Green Bay & Western Railroad*, — U. S. — (Jan. 7, 1946) to apply to any cases except those involving internal corporate affairs. For, if not so restricted, then any action, even if brought in the district [fol. 67] of the residence of the defendants, will have to be dismissed on a showing that it is vexatious.[1] Such a ruling cuts so deeply into traditional notions about the jurisdiction of the federal courts that I find it difficult to believe that the Supreme Court meant to go so far. I shall, however, assume arguendo that it did. Even on that assumption, I concur. For, on that assumption, a question of fact—as to the degree of vaxatiousness—arises in each case where the defendant moves to dismiss because of "inconvenience." On the facts stated by Judge Clark, I think defendant here has not made a sufficient showing of inconvenience to justify dismissal.

AUGUSTUS N. HAND, *Circuit Judge* (dissenting):

I think that the rule of *forum non-conveniens* may be applied in cases brought in the United States Courts, whether the jurisdiction be founded on diverse citizenship or may arise for other reasons, except where Congress has prescribed a different rule. This result seems to be implicit in the opinions of both majority and minority in *Baltimore & O. R. Co.* v. *Kempner*, 314 U. S. 44, and *Mikes* v. *Illinois Central R. Co.*, 315 U. S. 698, and to follow explicitly from the opinion of Justice Douglas in *Williams* v. *Green Bay and Western Railroad Co.*, decided January 7, 1946. See also *Meredith* v. *Winter Haven*, 320 U. S. 228. Indeed, the final paragraph of the opinion in *Williams* v. *Green Bay and Western Railroad Co.* discussed whether the maintenance of that suit in the Southern District of

[1] So if the instant case had been brought in a federal district court in the State of Pennsylvania, where defendant is incorporated.

New York was to be regarded as "vexatious or oppressive" in view of the availability of witnesses there and of the presence in that district of most of the defendant's di-
[fol. 68] rectors and of its corporate records, transfer and minute books. Therefore the question before us is simply whether in the present case the District Judge was justified in concluding that the maintenance of the action in the Southern District of New York, rather than in the Virginia District in which the plaintiff resided and the alleged tort occurred, was unduly burdensome to the defendant. I cannot see that anything is involved in the case at bar but the determination of whether the bringing of the action in New York was vexatious. While Judge Leibell in declining jurisdiction and granting the defendant's motion to dismiss the complaint attempted to apply the New York rule of *forum non-conveniens* the issue was one of substantive law but of procedure in the federal courts so that under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the New York decisions were pertinent only as instructive precedents and not as pronouncements of rules of law binding on the United States courts. Nevertheless the New York rule of *forum non-conveniens* in an action in tort like the present would not seem to differ from that of the federal courts for it cannot be supposed that in either jurisdiction a distinction would be made between personal torts and tortious injuries to property like those asserted in the case at bar. See *Murman* v. *Wabash Ry. Co.*, 246 N. Y. 244; *Wedemann* v. *United States Trust Co.*, 258 N. Y. 315; *Gregonis* v. *P. R. R. C. & I. Co.*, 235 N. Y. 152. Under the circumstances I think Judge Leibell exercised sound judgment in holding that under the rule of *forum non-conveniens* the jurisdiction of the Southern District Court was not properly invoked. Indeed the reasons which impelled his decision were the same that in *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, moved the Supreme Court even to deny jurisdiction in actions against railroads brought in
[fol. 69] districts remote from those in which the torts were committed and in which the plaintiffs did not reside, on the ground that they would involve unreasonable burdens upon interstate commerce.

The affidavits show that some three hundred and fifty claimants having property stored in plaintiff's warehouse reside in or about Lynchburg, Virginia, where the fire caused by defendant's alleged negligence occurred. De-

fendant's affidavits also say that the Jennings-Watts Oil Co., whose driver delivered the gasoline for the defendant to the plaintiff's warehouse, has its business in Lynchburg; that various persons, including firemen, police officers and other municipal employees, who will be necessary witnesses in respect to the plaintiff's gasoline storage and dispensing plant and its conformity with the local laws and ordinances, and the condition of the truck which delivered the gasoline are there; and several engineers and expert witnesses for the defendant reside in and about Lynchburg. The only answer of the plaintiff to these affidavits which would seem to have any importance is that some of the witnesses are scattered because of war conditions and their testimony can only be obtained by deposition; but there is no indication of how many of these witnesses there are and there is likelihood that they will be relatively few now that hostilities have ceased. The suggestion that the plaintiff will bring witnesses to New York gives the defendant no assurance that it can obtain those it needs without being compelled to rely chiefly on depositions. If there was ever a case where an effective defense was likely to be prevented and the plaintiff would be given undue advantage by a trial in New York I think this is one. The maintenance of the suit in the Southern District would be vexatious, inconvenient and wholly unnecessary and the order declining jurisdiction should be affirmed.

[fol. 70] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February one thousand nine hundred and forty-six.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

CORNELIUS GILBERT, etc., Plaintiff-Appellant,

v.

GULF OIL CORPORATION, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and case remanded in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 71] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Cornelius Gilbert, etc., v. Gulf Oil Corporation. Judgment. United States Circuit Court of Appeals: Second Circuit. Filed Feb. 4, 1946. Alexander M. Bell, Clerk.

[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 167

(Argued January 8, 1946. Decided February 3, 1946)

Docket No. 20049

CORNELIUS GILBERT, Plaintiff-Appellant,

v.

GULF OIL CORPORATION, Defendant-Appellee

PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The defendant-appellee, Gulf Oil Corporation, hereby respectfully petitions for a rehearing in the above appeal upon the following grounds:

1. We respectfully disagree with the holding of the majority of this court that the doctrine of *forum non conveniens* has no application to a case such as this.

2. A trial of this action in New York would frustrate the fair administration of justice because the testimony of many major witnesses on the principal issues of fact would have to be presented through the reading of their depositions by an attorney, with the attorney's inflections, mannerisms, and emphasis (or lack of it), thus depriving the judge and jury of the benefit of seeing and hearing, and hence, of any way of judging the credibility of, such major witnesses.

[fol. 73] 3. The defendant hereby stipulates and agrees that, if this action in the Southern District of New York is dismissed, it will enter its appearance in an action brought by the plaintiff in an appropriate court in Lynchburg, Virginia, if such action is brought within the period of the Virginia Statute of Limitations, that is, before March 8, 1949.

Point I

A trial of this action in New York would frustrate the fair administration of justice because the testimony of many major witnesses on the principal issues of fact

would have to be presented through the reading of their depositions by an attorney, with the attorney's inflections, mannerisms, and emphasis (or lack of it), thus depriving the judge and jury of the benefit of seeing and hearing, and hence, of any way of judging the credibility of, such major witnesses.

The defendant, in preparing its affidavits in support of its motion to dismiss on the ground of *forum non conveniens*, did not believe, and still does not believe, that it was necessary to educate the plaintiff concerning the details of all of its defenses or to give the court (and the plaintiff) a specification of the testimony and an identification by name of the particular witnesses by whom the defendant intends to prove such defenses.

The defendant, in its moving affidavits, stated certain undisputed facts which the court below did not repeat in its opinion, but which (R. 136-140 and 151) were clearly the basis of its conclusion that the lower court was not the proper forum. Some of these undisputed facts are set forth at folios 47-50, 51, 52, 64, 69, 107 and 111.

By way of illustration, we quote one of the statements of such undisputed facts for the convenience of this court (R. 47-49):

> "5. There are numerous other witnesses, including firemen, police officers, and other municipal employees, [fol. 74] as well as contractors and engineers, whose testimony will be necessary on behalf of the defendant if this action is tried. All of these persons reside in and about the City of Lynchburg, Virginia, and consequently are beyond the reach of the processes of this court. Defendant would have no way to compel them to attend a trial here.
>
> It is expected that these persons would be called for the purpose of testifying to the following matters, among others:
>
> (a) The location and *description of the place of the accident*, as well as *how* the accident occurred;
>
> (b) *The nature of the gasoline storage and dispensing equipment installed at the premises of the plaintiff* in Lynchburg, Virginia, its ownership, *its condition before* and after the alleged fire, whether

it was in conformity with the local laws and ordinances, etc., etc.;

(c) The condition of the delivery truck as observed by these witnesses both before and after the fire alleged in the complaint; and

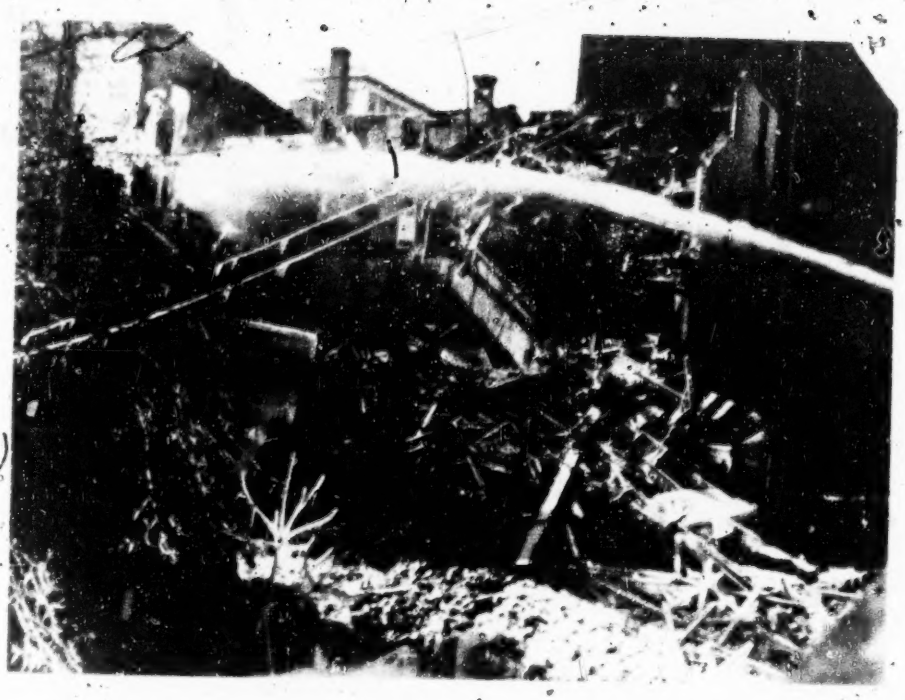
(d) The investigations made by such municipal employees and *other persons* residing in Lynchburg, Virginia immediately following the fire in question and the facts disclosed thereby." (Emphasis supplied.)

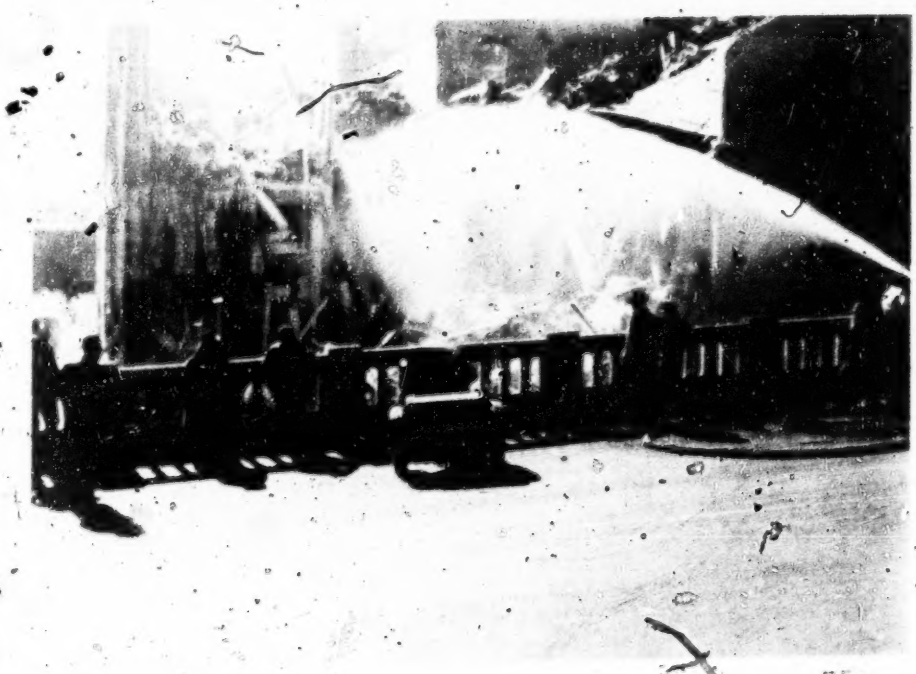
The defendant respectfully submits that the importance of the undisputed facts quoted and referred to above was not fully appreciated by the majority members of this court.

Three of the principal issues in this case will be the negligence of the defendant, the contributory negligence of the plaintiff, and the question of whether the defendant is immune from liability by reason of its claim that a Virginia corporation, the Jennings-Watts Oil Company, Inc. (who, through its employee, was delivering gasoline [fol. 75] to the plaintiff at the time the fire in question occurred) was an independent contractor.

The defendant expects to prove, *among other things*, that the plaintiff was guilty of gross negligence contributing to, if not solely causing, the fire out of which the plaintiff's alleged damages arose. We respectfully request this court to reconsider each of the evidentiary facts suggested by paragraphs (a) to (d) in the above quotation, and in doing so, to ask itself: "Where are the witnesses who know each of the facts which would support a defense of contributory negligence?"

Take one of the above facts, viz., "the description of the place of the accident." The complaint alleges that the "plaintiff's building was *totally* damaged and *destroyed*" by the fire in question (R. 15). To enable the court to visualize the condition of plaintiff's building when the defendant first learned of this case, we reproduce here, not as proof, but soley by way of illustration of a fact already in the case, two snapshots of such premises taken before the fire was extinguished.





75a

[fol. 76] Assuming that there were conditions in said building *before* the fire which would show that the plaintiff was guilty of contributory negligence, *where are the witnesses who can testify to such conditions?*

Other facts bearing upon the issue of contributory negligence mentioned in paragraph (b) of defendant's moving affidavit quoted above are the "nature of the gasoline storage and dispensing equipment installed at the premises of the plaintiff" (depicted above) and its "condition *before* * * * the fire." Where are the witnesses who can answer for the jury, the following questions in connection with such equipment?

1. Was the plaintiff's gasoline equipment installed in dangerous proximity to an open fire?

2. Was the gasoline fill-pipe located inside the plaintiff's building shown in the above photographs?

3. Would gasoline or its vapors released at the mouth of the fill-pipe come into contact inside said building with a flame?

4. Did the plaintiff completely dismantle all of his gasoline equipment and dig up and change the condition of the gasoline tank before this claim was asserted?

5. Were there any joints in these gasoline pipes in the same room in said building with a coal furnace or with electrical equipment liable to emit sparks?

6. Did the condition of this equipment and its location constitute an inherently dangerous instrumentality?

7. *When* was plaintiff's equipment first installed, and did it *then* amount to a violation of local safety ordinances and statutes?

8. Was plaintiff's equipment ever changed from its original location and condition, and, if so (a) what was the [fol. 77] change, (b) when was such change made, and (c) did the equipment *then* constitute a violation of local safety ordinances and statutes *then* in effect?

The defendant knows the answers to the above questions, and it also knows, as stated in its affidavits, that the persons who can answer them on the witness stand are in Virginia.

In a trial of this case in New York, the defendant could not have these numerous necessary and major witnesses in open court. One of defendant's key witnesses has stated that he will not come to New York (R. 62-65). The judge and jury would have no way of determining the credibility of numerous witnesses on the issue of liability. They certainly could not do so by listening to the dry reading of depositions by an attorney, with the attorney's own inflections and emphasis (or lack of it), with the attorney's forceful or unconvincing manner of delivery, and without the hesitant answers and evasive mannerisms of any of these witnesses or their attitude of telling the truth, the whole truth, and nothing but the truth. That is no way to try a law suit.

The defendant anticipates several sharp conflicts of testimony on this and on the other principal issues mentioned. *The subjection to cross examination before the jury of all witnesses who give conflicting testimony is imperative.* "A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." (Coxe, *J.*, in *Untermeyer* v. *Freund*, 37 Fed. 342. See also *Napier* v. *Bossard*, 102 F. 2d 467, 469.)

The defendant anticipates also that (as so frequently happens) it may be confronted during the course of the trial with surprises which may make it necessary to call witnesses that the defendant did not know of or did not realize would be needed at the commencement of the trial. If such witnesses should be 415 miles away from the court, [fol. 78] which is the distance from Lynchburg, Virginia, to New York City (R. 71), the defendant would probably be unable to obtain and present their testimony to the jury during the trial. Such a situation might well result in an entire frustration of the ends of justice in this case.

The plaintiff's attorney glibly tells this court that he will himself bring to New York all of the witnesses necessary to the *defense* of this case. In effect, the plaintiff nonchalantly says to the defendant and to the court: "Witnesses? Oh, I'll bring in all the witnesses the defendant and the trial court will need." But the plaintiff's attorney has not been preparing a defense. Obviously, he has no interest in knowing, and would not know, the names of many of the witnesses needed by the defendant to prove not only the facts indicated above, but many other facts

in this case detrimental to the plaintiff. The absurdity of expecting a trial lawyer to be contented with an "assurance" of this character from his opponent is manifest. If the shoe were on the other foot, it would be painful to the plaintiff. Moreover, even if the plaintiff were sincere in offering such "assurances," *how could he compel any Virginia resident to come to New York to testify?*

Unless the lower court's decision is affirmed, it clearly appears that the defendant will have to try this case with only the *plaintiff's witnesses* and those (*if any*) that the defendant can induce voluntarily to close their shops in Lynchburg, Virginia, and come to New York, at their own or at the defendant's expense and trouble. As regards practically all of the major witnesses needed for its defense, the defendant and the court and jury will have to be contented with written depositions, unless this case is sent to Virginia.

The defendant respectfully submits that a trial by deposition of the principal issues of fact in a case such as this would not be due process of law, for obviously the ultimate outcome of this litigation will depend upon the case being tried in an appropriate forum. This is not a [fol. 79] mere question of the forms of practice or modes of procedure to be followed, once the case is in court, but of whether the case should be in the lower court at all. When the final outcome of litigation depends upon the question of where the action is tried, that question becomes a question of real substance.

Other Pertinent Considerations

If the District Court is not permitted to exercise discretion in rejecting jurisdiction in actions such as this on the ground of *forum non conveniens*, then it will be readily apparent that insurance subrogation actions to recover on torts occurring in all of the forty-eight states can be brought freely in New York City against the thousands of foreign corporations, large and small, who have obtained permission from the State to do *local intrastate* business.

In fact, this whole case (for aught that appears), may have been snared by one foot (a subrogation clause in an insurance policy) and dragged here bodily from Lynchburg, Virginia, the place where one would have naturally expected it to be tried. Attorneys for insurance companies with offices in New York should not be *expressly invited*

to bring such suits here in New York, as they will be, unless the lower court's discretion to remit the parties to the appropriate forum is sanctioned and upheld in this case. This court, as a court of justice, has the inherent power to avoid being used as such an instrument of injustice, and hence it can, and should, affirm the lower court's dismissal of this action.

Conclusion

We submit that the exposition given above will convince every member of this court (1) that the doctrine of *forum non conveniens* should be applied in this case, and (2) that it will be manifestly unjust to deny to the defendant the relief it here seeks—particularly, in view of the [fol. 80] fact that *the plaintiff, Gilbert, will suffer absolutely no inconvenience or hardship in being required to commence this suit in an appropriate court in Lynchburg, Virginia*, where the defendant willingly stipulates to enter an appearance.

Wherefore, the defendant-appellee, Gulf Oil Corporation, hereby respectfully requests that this court rehear this appeal and that, upon such rehearing, this honorable court affirm the judgment of the lower court dismissing the complaint in this action.

Respectfully submitted, Gulf Oil Corporation, Appearing Specially by Matthew S. Gibson, Its Attorney.

Archie D. Gray, Of Counsel.

Certificate of Counsel

I, Matthew S. Gibson, attorney and counsel for the defendant-appellee, appearing specially, hereby certify that the above petition for rehearing is presented in good faith and not for delay.

Dated: February 16, 1946.

Matthew S. Gibson.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CORNELIUS GILBERT, Plaintiff-Appellant,

against

GULF OIL CORPORATION, Defendant-Appellee.

Before: Augustus N. Hand, Clark and Frank, Circuit Judges.

ON PETITION FOR REHEARING

Matthew S. Gibson, for petitioner,

PER CURIAM: Petition denied. C E C, J N F, C. JJ.

Filed February 23, 1946.

[fol. 82] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of February, one thousand nine hundred and forty-six.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

CORNELIUS GILBERT, Plaintiff-Appellant,

v.

GULF OIL CORPORATION, Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk.

[fols. 83-84] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Cornelius Gilbert v. Gulf Oil Corporation. Order. United States Circuit Court of Appeals, Second Circuit. Filed February 23, 1946. Alexander M. Bell, Clerk.

[fol. 85] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.